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No 80-93

In The

SUPREME COURT OF THE UNITED STATES

October Term 1980

ELMER PRICE MACFARLANE,

Petitioner,

v.

JOSEPH B. BERTLING and VERONICA BERTLING, husband and wife,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTION PRESENTED

Whether there was a denial of substantive "Due Process" by state action taking real property from Macfarlane and giving it to other citizens who claimed adverse possession, when there was no evidence to establish adverse possession for the statutory ten-year period, and dismissal of Macfarlane's action for ejectment was contrary to established law.

PARTIES INVOLVED

Elmer Macfarlane brought action for ejectment. Defendants Bertling asserted adverse possession. Their third party complaint against their predecessors in title, Jasper L. Trevett and his former wife, Wanda Janice Halderman, was not prosecuted.

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Constitution and Statute

United States Constitution, Article I Section 1 4;5

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OPINIONS BELOW

No opinion by any court below was reported. See Appendix A-3 for opinion of the Honorable Samuel Bowe, former circuit judge, pronounced from the bench. The Court of Appeals of the State of Oregon affirmed without opinion, A-1, A-2. The Supreme Court of the State of Oregon declined without opinion to review the case by order entered April 22, 1980. A-1.

JURISDICTION

This Petition for Writ of Certiorari is timely filed within ninety days from April 22, 1980, when the Supreme Court of the State of Oregon denied appellant's Petition for Review.

The statutory provision believed to confer jurisdiction on this court is 84 Stat. 590, 28 USC Sec. 1257.

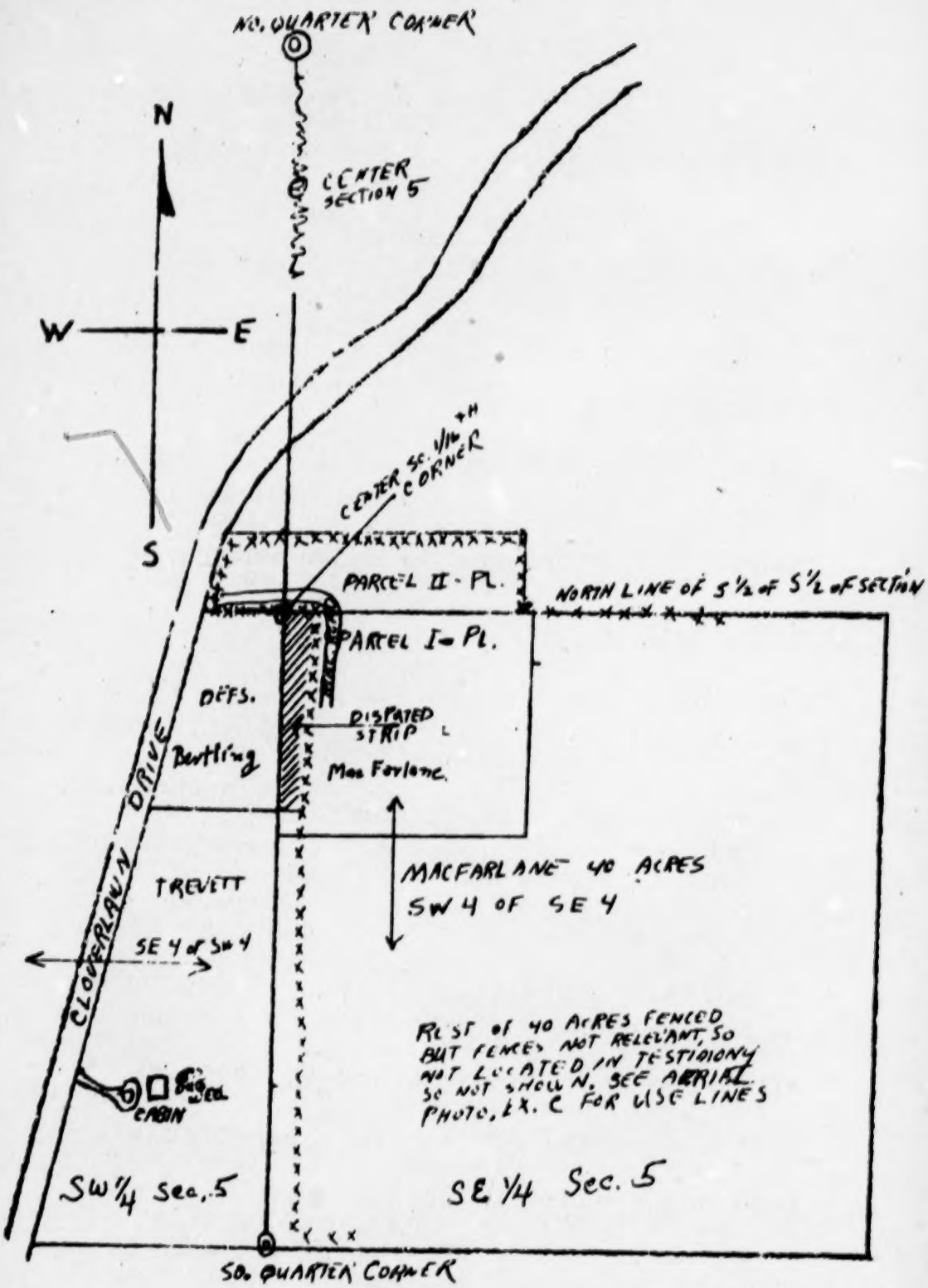
CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article XIV, Section 1 provides in pertinent part:

"...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

The federal question, that real property of one citizen cannot be taken and given to another citizen in violation of substantive due process of law, was implicit throughout the proceedings below. Macfarlane objected to the Bertlings' requested findings, which consisted only of mere conclusions unsupported by any findings of evidentiary fact. A-4, A-5. Dismissal of Macfarlane's Complaint for Ejectment of the Bertlings from a strip of land approximately forty feet wide, running north and south along the western boundary of Macfarlane's land, as shown by the diagram on the next page, took from Macfarlane and gave to the Bertlings this land without evidentiary support for the Bertlings' claim of adverse possession for the ten year period required by law.


NO. QUARTER CORNER
CENTER SECTION 5
N
W
E
S
CENTER SC. 1/16 CORNER
PARCEL II - PL.
NORTH LINE OF S 1/2 of S 1/2 of SECTION
PARCEL I - PL.
DEFS.
Bentling
DISPUTED STRIP
Mac Farlane
CLOVERLAWN DRIVE
TREVETT
SE 4 of SW 4
MACFARLANE 40 ACRES
SW 4 OF SE 4
REST of 40 ACRES FENCED BUT FENCES NOT RELEVANT, SO NOT LOCATED IN TESTIMONY SO NOT SHOWN. SEE AERIAL PHOTO, EX. C FOR USE LINES
CABIN
SW 1/4 Sec. 5
SE 1/4 Sec. 5
SO. QUARTER CORNER

BRIEF Ex. 1

In 1929, plaintiff's parents, the elder Macfarlanes, took deeded title to the Southwest quarter of the Southeast quarter of Section 5, T. 37 S., R. 5 W., W.M., in Josephine County, Oregon, containing 40 acres. The western boundary of their land was thus the center section line dividing the Southeast quarter of Section 5 from the Southwest quarter of Section 5. There was no known survey of that line at that time.

The Macfarlane's land and the adjacent lands to the West were wild and unenclosed. To keep their cattle from straying, the Macfarlanes built a drift fence without attempting to place it on their boundary line. No use was being made of the land in the Southeast quarter of the section. After the whole area burned in 1939, the Macfarlanes did not make any use of their land and the drift fence decayed.

The testimony shows that the first use of the unenclosed land west of the

Macfarlane's property was made after a Mr. Fields sold that land to a Mr. Trevett, who moved onto it in 1968.

The deed received by Mr. Trevett described a portion of the Southeast quarter of the Southwest quarter of Section 5. Mr. Trevett assumed that the center section line dividing his land from the Macfarlane land in the Southeast quarter of Section 5 coincided with the decayed old drift fence. To keep deer out of the berries which he planted, Mr. Trevett constructed a new fence to replace the Macfarlane's old fence.

In 1971, Mr. Trevett sold the northern portion of his land to defendants Bertling. There was no survey, but the Bertlings understood that their land extended to the fence Mr. Trevett had built in 1968.

In 1972, third parties caused a survey to be made of the center section line

dividing the Southwest quarter from the Southeast quarter of Section 5, and it became known that the line ran approximately 40 feet west of the fence built by Mr. Trevett.

In 1975, by partition of the family estate, plaintiff Elmer Macfarlane acquired the land in the Southeast quarter of Section 5 adjoining Bertling's property. The Macfarlanes demanded that the fence be moved westward to the center section line boundary. Mr. Trevett complied, not wishing to assert possession adverse to the Macfarlanes. But the Bertlings refused to move the fence back to the center section line border of their property.

In 1976, when Elmer Macfarlane brought this case for ejectment against the Bertlings, they asserted as a defense adverse possession of the strip of land between the center section line and the fence Mr. Trevett had unwittingly built on Macfarlane's land.

The Circuit Court's dismissal of Macfarlane's ejectment action, affirmed without opinion by the Oregon Court of Appeals (A-1, A-2), was contrary to long-established Oregon law, which requires proof of actual, open, notorious, exclusive, continuous and hostile possession under claim of right or color of title for the full statutory period of ten years. Lee v. Hansen, 282 Or 371, 578 P2d 784; Nelson v. Vandemarr, 281 Or 65, 57 3 P2d 1232; Terry v. Timmons, 282 Or 363, 578 P2d 405 (1978).

The Bertlings had no color of title to the disputed strip of land and their possession commenced in 1971, only five years before Macfarlane brought ejectment in 1976. They cannot fill out the ten year requirement by tacking the ownership of their predecessors, because Mr. Trevett did not assert the hostility to Macfarlane's title required for adverse possession. After a registered land surveyor

established the center line of Section 5, Mr. Trevett moved his deer fence to that line on his land and made no claim to plaintiff's land. And there was no evidence to show that Mr. Trevett's predecessor in title, Mr. Field had asserted any possession adverse to the Macfarlanes.

Nelson v. Vandemarr, 281 Or 65, 573 P2d 1232 (1978) holds:

> "In view of evidence that occupant of land was in doubt as to boundary line between his property and neighbor's property and that occupant intended to claim only to the true boundary line, hostility required for adverse possession was lacking."

REASONS FOR GRANTING THE WRIT

The decision of the courts below, agencies of the State of Oregon, constituted state action which deprived Macfarlane of real property and granted it to other citizens, when there was no legal justification for doing so. Such state action denied to Macfarlane sub-

stantive "Due Process", in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. It denied to Macfarlane equal protection of his constitutionally guaranteed right to property.

Substantive due process applies to all branches of state government, including the judiciary. A state court cannot deviate from the settled law of a state nor deprive a citizen of his rights to property without compliance with the general law of the state. Here, the state court took from Macfarlane his real property and gave it to the Bertlings, contrary to the general and established law of the state.

If due process is to be secured, the laws must operate alike upon all. The individual citizen must not be subjected to the arbitrary exercise of governmental

power exercised by a state court, unrestrained by established principles of private rights and distributive justice. His rights are measured not by rulings made to affect him individually but by general provisions of law applicable to all those in like condition. If his property rights are taken from him and given to another by a failure or refusal to determine his rights by general provisions of law applicable to all those in like condition, then such taking and disposal of his property to another is violation of due process.

We recognize that the Court has in the past refused to review, on other than procedural grounds, the constitutionality of state action. But after noting that the due process clause, by reason of its operation upon "all the powers of government, legislative as well as executive and judicial", could not be

appraised solely in terms of the "sanction of settled usage", Justice Matthews, speaking for the Court in Hurtado v. California, 110 U.S. 515 (1884), declared that:

> "Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations is a device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of government."

Thus the states were put on notice that every species of state action, whether dealing with procedural or substantive rights, was subject to the scruting of the court when the question of its essential justice is raised.

In Loan Association v. Topeka, 20 Wall 655, 663 (1875), the Court said:

> "There are ...rights in every free government beyond the control of the state...There are limitations on (governmental power) which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social contract could not exist...." "Rights to life, liberty and the pursuit of hapiness are equivalent to the rights of life, liberty and property. These are fundamental rights which can only be interfered with, or the enjoyment of which can only be modified, by regulations necessary or proper for the mutual good of all."

The conclusions of the trial court, affirmed by the Court of Appeals without opinion, were not based upon findings of ultimate fact. Instead of making findings of ultimate fact, the trial court merely concluded, over the plaintiff's objection, that the plaintiff had not established the facts of his complaint, and that the defendant had established the affirmative defense of adverse possession. A-4, A-5.

Conclusions unsupported by probative findings of fact cannot stand. A judgment on trial by the court without findings is void or voidable. Clackamas Southern Ry. Co. v. Vick, 72 Or 580, 144 Pac 84 (1914); Frederick & Nelson v. Bard, 66 Or 259, 134 Pac 318 (1913);

A leading case on findings is Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F2d 554, 559, cert. den. 59 S. Ct. 72. It points out the difference between findings of ultimate fact and conclusory findings and discusses the reasons why findings of fact are indispensable.

> "The requirement that courts and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties

> and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law." 96 F 2d at 559.

Failure to correct the errors which have led to misapplication of the long-established legal principles to the facts of this case would invite the lower courts to make similar errors in the future when adjudicating title disputes. It would lead to confusion and set an example of indifference to failure to make findings of evidentiary fact to support conclusions.

It would constitute a demoralizing instance of toleration for injustice. Macfarlane should not be deprived of any part of his land when the facts in the record show that no adverse possession was maintained by defendants for the requisite ten-year period.

For the foregoing reasons, the petitioner respectfully requests this Honorable Court to grant a writ of certiorari and to take jurisdiction of this matter and to reverse the state action below.

Respectfully submitted,

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APPENDIX

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SUPREME COURT OF THE
STATE OF OREGON

Macfarlane vs. Bertling
CA 14962 SC 26944

The Supreme Court on April 22, 1980, denied Appellant's Petition for Review in the above-entitled matter.

/s/ Carol Justis
Records Administrator

No opinion was written by the Supreme Court of the State of Oregon.

STATE OF OREGON
COURT OF APPEALS

Elmer Price Macfarlane, Appellant,	)	
v.	)	CA 14962
JOSEPH B. BERTLING and VERONICA BERTLING, husband and wife, Respondents,	)	JUDGMENT AND MANDATE
JASPER L. TREVETT and WANDA JANICE HALDERMAN, Third Party Defendants	)	

Appeal from Josephine County Circuit Court No. 76-234-L

This cause having come on to be heard on appeal and having been duly submitted and considered and the Supreme Court having denied review on April 22, 1980;

IT IS HEREBY ADJUDGED AND ORDERED that the decision entered below in this cause is affirmed.

IT IS FURTHER ORDERED that respondent recover from appellant costs and disbursements in this court in the amount of $90.

The cause is returned below for further proceedings pursuant to law and the opinion and order of the court entered March 3, 1980.

Issued at Salem Oregon: May 8, 1980.

No opinion was written by the Court of Appeals of the State of Oregon.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Elmer Price Macfarlane,
Appellant,
v.
Joseph B. Bertling and Veronica Bertling, husband and wife,
Respondents

CA No. 14962
Circuit Court
No. 76-234-L

Jasper L. Trevett and Wanda Janice Halderman,
Third-Party Defendants

County Josephine Judge Samuel M. Bowe

Date Argued January 21, 1980

Before Schwab, Chief Judge, and Thornton and Campbell, Judges

William M. Sloan, Grants Pass, Attorney for Appellant
Donald H. Coulter, Grants Pass, Attorney for Respondents

Date affirmed without opinion (ORS 19.180) and date filed March 3, 1980

The only "opinion" expressing any basis for the decision of the trial court was the following oral statement made by the Honorable Samuel M. Bowe, judge of the Circuit Court of the State of Oregon for the County of Josephine, in open court on May 2, 1979: (Transcript 264-266)

"I think rather than taking this case under any further considerations, writing any opinion, trying to explain my views in the matter, I'll decide it right here and now."

"I'll decide that the fences were built in 1929 or 1930; that the property was occupied as one piece of property from that time on until 1971 when it was divided. That the use that was made of the entire property is the use that was made of the lower part of the property is the use of the entire piece of the property. that the nature of the land and so forth like that does not require a person who occupies a large piece of property to run around the boundary line to protect his ownership. And the proper findings of fact and conclusions of law denying relief to the plaintiff may be prepared and entered by the attorney for the defendants."

"That description was recognized for years and years and years not only by the Macfarlanes, by the Trevetts, by the Fields, by everybody else that had anything to do with that property and I don't believe that it's adverse, if it's what you're contending Mr. Sloan, Macfarlane would come down and trespass on the Bertling property, but did not do anything more than just what Trevett did, then I think maybe you might have a point for the contention you're making, but I

think when you own a piece of property, the fences and the description in the deeds are made out like they have been in this case, you don't have to go and squat on every corner of that land every day to keep the title. You own it period. That's it."

On May 4, 1979, defendants (Bertlings) filed with the Court Proposed Findings of Fact and Conclusions of Law, generally finding that plaintiff (Macfarlane) had not proven the facts alleged in his Complaint by a preponderance of the evidence.

On May 8, 1979, plaintiff filed Objections to Such Proposed Findings of Fact as misleading and failing to reflect the Court's actual opinion, which was based on defendant's affirmative defense of adverse possession, not upon a failure of proof by plaintiff.

After oral argument the trial court directed defendant to submit different findings.

On May 14, 1979, defendants submitted Findings of Fact and Conclusions of Law, which were signed by the trial court May 17, 1979. These consisted of two conclusory statements: that Plaintiff had not established the facts of his Complaint by a preponderance of the evidence, and that defendants had established the affirmative defense of adverse possession in their answer by a preponderance of the evidence.

On May 23, 1979 plaintiff filed further Ojections to Findings of Fact on the grounds that the only reason expressed by the trial court to deny

plaintiff relief was the affirmative defense of title by adverse possession which was not supported by any evidence of actual adverse possession for over ten years. Plaintiff tendered Alternative Findings of Fact and Conclusions of Law to the effect that plaintiff had established the facts of his case by a preponderance of the evidence, and that defendants had failed to prove the affirmative defense of adverse possession.

On June 13, 1979, the trial court entered a Judgment Order dismissing the complaint for ejectment and awarding defendants their costs as taxed.

On March 3, 1980, the Court of Appeals of the State of Oregon affirmed without opinion.

On April 22, 1980, the Supreme Court of the State of Oregon denied Macfarlane's Petition for Review, without opinion.